BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHY L. NEIL	)	
Claimant	)	
	)	
VS.	)	
	)	
AMERICA'S BEST VALUE INN	)	
Respondent	)	Docket No. 1,056,381
	)	
AND	)	
	)	
MIDWEST INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) request review of the September 15, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Claimant appears by Melinda G. Young, of Hutchinson, Kansas. James P. Wolf, of Kansas City, Kansas, appears for respondent.

ISSUES

1. Whether claimant sustained personal injury by accident which arose out of and in the course of her employment with respondent.

2. Whether claimant served timely written claim on respondent as required by K.S.A. 44-520a.

FINDINGS OF FACT

The record on appeal is the same as was considered by the ALJ, consisting of the August 17, 2011, transcript of preliminary hearing, with exhibits; the transcript of the deposition of claimant dated July 26, 2011; the transcript of the deposition of Surge Bhakta dated August 3, 2011, with exhibits; the transcript of the deposition of Pam Bhakta dated August 9, 2011; the transcript of the deposition of Danny Bhakta dated August 9, 2011; the transcript of the deposition of Jody Carpani dated August 15, 2011, with exhibits; and the

pleadings contained in the administrative file. After reviewing the record and considering the arguments of the parties, the undersigned Board Member finds:

The ALJ awarded medical treatment and temporary total disability benefits. Although the preliminary order does not specifically address the issues raised by respondent for consideration in this review, it is assumed that the ALJ resolved those issues in favor of claimant because preliminary benefits were awarded.

Claimant was 50 years old when she was deposed. She commenced employment for respondent in 2007 or 2008. She initially worked in housekeeping, then worked at the front desk. Claimant quit and was rehired to work in housekeeping. By the date of her alleged accident, claimant had performed housekeeping duties for two to three months. On February 27, 2010, claimant alleges she was injured when she grabbed a sweeper, turned it on, and felt a popping sensation in her right wrist as she was vacuuming. Claimant denied having any problems or injuries involving her right wrist before February 27, 2010.

Claimant testified that her accident was witnessed by Danny, whom she described as the owner of respondent and her supervisor. According to claimant, Danny inquired what had happened and claimant responded that her wrist popped. Danny Bhakta testified that he is not the owner of respondent but does work in housekeeping. Mr. Bhakta denied that he witnessed claimant's accident. Claimant says that on February 27, 2010, she provided notice of the accident to Surge Bhakta,[1] respondent's general manager. Surge Bhakta denied that he received notice from claimant on February 27, 2010. At her deposition, claimant testified that she and Surge Bhakta filled out a form on the date of accident; however, by the time she testified at the preliminary hearing, claimant apparently changed her mind about that.[2] Respondent did not send claimant for medical treatment, so claimant went on her own to the Hutchinson Clinic on March 1, 2010.[3] Claimant received authorized treatment from the Hutchinson Clinic on March 1, 10, 19, and April 2, 2010. The claims adjuster, Jody Carpani, testified that the bills relating to that treatment were paid as authorized medical.

Claimant returned to the Hutchinson Clinic on August 30, 2010; however, the charges for that office visit were not paid by respondent. Neither respondent nor the insurance carrier notified the Clinic or claimant after April 2, 2010, that treatment was no

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[1] Surge Bhakta is the son of Danny Bhakta and Pam Bhakta.

[2] Neil Depo. at 34; P.H. Trans. at 9.

[3] Claimant testified that Surge Bhakta "went by Ian when he answered the phone at the front desk." P.H. Trans. at 12. The records of the Hutchinson Clinic appear to document authorization for treatment received from "Ian" on March 1, 2010. P.H. Trans., Cl. Ex. 1.

longer authorized with that provider. The last medical bill paid by the carrier was on August 31, 2010, for services rendered by the Hutchinson Clinic on April 2, 2010.[4]

Pam Bhakta testified that she is in charge of the housekeeping department for respondent. On the date of the alleged accident the housekeeping department consisted of only three employees, including Pam and claimant. Pam Bhakta testified that during the first week of March 2010 she noticed claimant wearing a wrist brace or a splint. When Ms. Bhakta inquired of claimant regarding her wrist, claimant responded that she had hurt it in a fight with her boyfriend. Claimant denied saying that and also denied that her boyfriend ever injured her right wrist.

Surge Bhakta testified that he first became aware that claimant was claiming a work-related injury during the first week of March 2010. Surge was not told by his mother, Pam Bhakta, about the alleged "boyfriend" incident until the morning of Surge's deposition on August 3, 2011, a period of approximately 17 months.[5] The insurance carrier had a number of contacts with Surge Bhakta, beginning on March 15, 2010. There is no indication that the insurance carrier was advised by respondent about the "boyfriend" incident or regarding any concerns about the compensability of the claim. There is no reference in the medical records of the Hutchinson Clinic or in the July 14, 2011, report of Dr. Pedro A. Murati, who saw claimant at her attorney's request on that same date, to any such incident.

The initial diagnosis of Dr. Jeffrey L. Thode of the Hutchinson Clinic was synovitis of the right wrist secondary to overuse. Dr. Thode's final diagnosis was tendonitis of the palmaris longus tendon with possible carpal tunnel syndrome. Dr. Murati's diagnosis was right carpal tunnel syndrome secondary to the repetitive nature of claimant's job for respondent and cortisone induced subcutaneous atrophy of the right distal forearm. Dr. Murati concluded that claimant's diagnoses are the direct result of the work-related injury sustained by claimant on February 27, 2010.

Claimant has worked for two employers since she last worked for respondent; however, claimant testified that her symptoms have "stayed constant."[6]

There is no direct evidence in the record indicating that an Employer's Report of Accident (ERA) was ever filed with the Kansas Division of Workers Compensation. Ms. Carpani testified that she does not know if an ERA was filed with the Division.[7]

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[4] Carpani Depo., Ex. 1.

[5] Surge Bhakta Depo. at 16, 17.

[6] Neil Depo. at 57.

[7] Carpani Depo. at 26, 27.

An ERA was apparently prepared by the insurance carrier on March 15, 2010,[8] but there is no indication that it was ever filed. Surge Bhakta testified that he did not file an ERA.[9]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[12]

K.S.A. 2009 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[8] Surge Bhakta Depo., Ex. 7.

[9] *Id.*, at 32.

[10] K.S.A. 2009 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[12] *Id.*, at 278.

K.S.A. 2009 Supp. 44-508(d) in part states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 44-520a provides in relevant part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Under certain circumstances, the time period for serving a written claim upon the employer may be extended. K.S.A. 44-557 states in relevant part:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.
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> . . . .
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> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS

This Board Member finds that claimant has sustained her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment with respondent on February 27, 2010.

The evidence is disputed on this issue. The ALJ had the opportunity to observe claimant testify at the preliminary hearing and evidently found claimant's testimony credible. The only documented injury in this record is that claimant felt a popping sensation in her wrist while vacuuming following grabbing a sweeper and turning it on. All of the records and reports in evidence corroborate claimant's testimony about how she was injured. Claimant had no right forearm injuries or problems before the February 27, 2010, event. Hence, there is no evidence of other traumatic events other than the accidental injury described by claimant, with the exception of the evidence regarding the "boyfriend" incident. The origin of the evidence that claimant hurt her right forearm in a fight with her boyfriend is Pam Bhakta, who described herself as in charge of respondent's housekeeping department. At the time of claimant's alleged injury, apparently the members of respondent's housekeeping crew consisted of Pam Bhakta; her husband, Danny Bhakta; and claimant.

It is difficult to place any credence in Pam Bhakta's testimony. Although Ms. Bhakta was claimant's supervisor and in charge of housekeeping, according to the testimony of Surge Bhakta, Pam's son and the general manager of respondent, he did not know anything about the "boyfriend" story until the very morning of his deposition, almost 17 months after the alleged conversation. It is improbable that Pam Bhakta would have withheld from her son and general manager, Surge Bhakta, the "boyfriend" story from the first week in March 2010 to the date Surge testified, August 3, 2011. Respondent said nothing to the insurance carrier about the "boyfriend" event, or any other issues regarding the validity of this workers compensation claim.

The medical evidence consists of the records of the Hutchinson Clinic and the report of Dr. Murati, which document the accident described by claimant. The medical evidence

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[13] K.S.A. 44-534a.

[14] K.S.A. 2010 Supp. 44-555c(k).

associates claimant's diagnoses with her work for respondent. Respondent offered no medical evidence.

This Board Member also finds that claimant served timely written claim on respondent. The parties stipulated that respondent was provided with timely notice pursuant to K.S.A. 44-520. Although there is no direct evidence that respondent or the insurance carrier chose to file with the Kansas Division of Workers Compensation the Employer's Report of Accident (ERA) pursuant to K.S.A. 44-557, it is a reasonable inference from the evidence that no such filing was made. Jody Carpani from the insurance carrier testified that the ERA was prepared by the carrier, but she does not know if it was ever filed. Respondent denied filing an ERA. The ERA prepared by the insurance carrier is in evidence, but there is no indication it was filed with the Division within the 28 days required by K.S.A. 44-557.

Since the evidence indicates that no ERA was timely filed with the Division, the time in which written claim had to be served was extended from 200 days to one year pursuant to K.S.A. 44-557.

The treatment authorized by respondent with the Hutchinson Clinic commencing on March 1, 2010, and continuing through April 2, 2010, was paid for as authorized medical treatment. The insurance carrier last paid for medical treatment on August 31, 2010. Respondent did not pay for claimant's office visit to the Hutchinson Clinic on August 30, 2010, on the basis that the office visit was not authorized. However, there is no evidence that claimant was advised by respondent that the Hutchinson Clinic was no longer authorized to provide treatment in this claim. The Clinic was not informed before August 30, 2010, that the previous authorization to treat was withdrawn. Once a course of medical treatment is authorized by the employer, and the employer, for whatever reason, determines that the medical treatment is no longer authorized, the employer is under an affirmative duty to notify the worker before the written claim time will begin to run.[15] Because there is no evidence that claimant was notified that Hutchinson Clinic was no longer authorized to provide treatment, the time in which written claim had to be served commenced on August 30, 2010, and continued for one year after that date.

An application for hearing, if timely filed, constitutes a written claim for compensation.[16] Claimant's Application for Hearing was filed with the Division of Workers Compensation on June 15, 2011, well within the one-year period following August 30, 2010. Hence, written claim was timely served on respondent.

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[15] *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973); *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, 642 P.2d 574 (1982).

[16] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

CONCLUSION

1. Claimant sustained personal injury by accident arising out of and in the course of her employment on February 27, 2010.

2. Timely written claim was served on respondent.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the September 15, 2011, preliminary hearing Order entered by ALJ Bruce E. Moore is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge